

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH RAYMOND CALIHAN,

Defendant and Appellant.

A145746

(Contra Costa County  
Super. Ct. Nos. 5-041123-1, 5-15094-2)

Defendant Kenneth Raymond Calihan has filed two notices of appeal from separate trial court orders.<sup>1</sup> Defendant is currently serving an 18-year prison term imposed in 2006 based upon a no contest plea to first degree residential burglary and possession of drug paraphernalia. That sentence was derived by doubling the four-year midterm for the residential burglary, based upon a prior strike conviction, plus two consecutive five-year terms under Penal Code section 667, subdivision (a)(1)<sup>2</sup> for prior felony convictions. At the time of sentencing, defendant was awarded actual pretrial local custody credit of 727 days and good time credit of 363 days.

In his initial notice of appeal defendant timely appeals from the denial of his “motion to correct abstract of judgment” seeking an additional 363 days of good time credit under the one-for-one formula in former section 4019 that became effective January 25, 2010, and was replaced by the previous one-for-two credit rate as of

<sup>1</sup> The two notices of appeals are hereby consolidated for all purposes.

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

September 28, 2010. (Stats. 2009, 3d Ex. Sess. 2009-2010, ch. 28, § 50; Stats. 2010, ch. 426, § 2.)<sup>3</sup> The trial court denied this motion based on the explicit holding in *People v. Brown* (2012) 54 Cal.4th 314 that former section 4019, as operative between January 25 and September 28, 2010, applied prospectively and only to prisoners in local custody after the operative date of the statute, January 25, 2010.

In his second notice of appeal defendant timely appeals from the denial of his petition for a writ of habeas corpus. In this petition defendant alleges that his sentence should be reduced by five years based on the intervening reduction from a felony to a misdemeanor of the conviction in the San Bernardino County Superior Court on which one of the five-year enhancements to his current sentence was imposed under section 667, subdivision (a). Defendant included in his moving papers in the trial court a “response to defendant’s petition for resentencing under Proposition 47,” in which the San Bernardino County District Attorney acknowledged that defendant is “eligible for relief under Proposition 47,” and what purports to be a minute order of the San Bernardino County Superior Court which reads: “Petitioner’s motion for resentencing pursuant to PC1170.8 is granted. [¶] . . . PC496(1) a felony is hereby reduced to a misdemeanor.” Neither document was certified or bore a file stamp of the San Bernardino County Superior Court and the trial court here denied the petition for habeas corpus with the following explanation: “Nothing on the face of the ‘minute order’ attached to the petition would permit the conclusion that it is a true copy of a document actually filed in San Bernardino Superior Court. Accordingly, the petition is inadequate. *People v. Duvall* (1995) 9 Cal.4th 464, 474.”

Defendant’s counsel has filed a brief pursuant to *People v. Wende* (1979) 25 Cal.3d 436 and requests that we conduct an independent review of the record. Defendant was informed of his right to file a supplemental brief and has not done so. Having independently reviewed the record, we conclude that there are no issues requiring further

---

<sup>3</sup> The statute has subsequently been amended yet again. (Stats. 2011, ch. 15, § 482; Stats. 2011, ch. 39, § 53; Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 35; Stats. 2014, ch. 612, § 6.)

briefing as to the order denying additional pretrial good time credit. The trial court correctly held that *People v. Brown, supra*, 54 Cal.4th 314 precludes the retroactive application of former section 4019, as operative for seven months in 2010, to local custody served prior to that time period.

With respect to the denial of habeas corpus, we have some reservations. Pursuant to a request from the clerk of this court to the clerk of the San Bernardino County Superior Court, we have received a certified copy of the San Bernardino County Superior Court's minute order granting defendant's motion for resentencing of the conviction underlying the enhancement in the case before us, which is identical to the copy attached to defendant's petition. The order is subject to judicial notice, although defendant made no request that the trial court take judicial notice of the document. Under the circumstances we deem the most efficient disposition, that will permit the district attorney and the trial court to address the merits of defendant's petition, is to remand the matter to the trial court for further consideration, taking judicial notice of the order of the San Bernardino County Superior Court.

The May 27, 2015 order denying the motion for additional custody credits is affirmed. The August 6, 2015 order denying the petition for a writ of habeas corpus is remanded to the trial court for further consideration.

---

Pollak, J.

We concur:

---

McGuinness, P. J.

---

Siggins, J.